(18) (17) (18)

Nos. 85-1377, 85-1378, 85-1379

Supreme Court, U.S.
FILED
APR 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER,
COMPTROLLER GENERAL OF THE UNITED STATES,
Appellant

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees

UNITED STATES SENATE,
Appellant

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Appellants

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees

On Appeals from the United States District Court for the District of Columbia

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BRIEF FOR THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED

I. Did the court below correctly hold that the Balanced Budget and Emergency Deficit Control Act of 1985 violates separation of powers principles in assigning a significant executive role to the Comptroller General, an official who is removable by and otherwise answerable only to Congress?

II. Did the district court err in concluding that the automatic spending reduction mechanism in the Act was not an unconstitutional delegation of legislative power where the Act charges unelected officials with the unprecedented power to undo duly enacted appropriations law, and is designed to thwart congressional accountability by allowing the federal budget deficit to be cut without legislative approval or the possibility of an executive veto.

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BRIEF FOR THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF THE *AMICUS*

Amicus is a labor union which represents federal employees in nearly every government agency. *Amicus* and its members, who include retired federal employees, have a vital interest in this case, which presents constitutional issues concerning separation of powers and the delegation of appropriations power to administrative officials. That vital interest derives primarily from the adverse impact that the Balanced Budget and Emergency Deficit Control Act of 1985, is having and will continue to have on 1) the continued employment and other working conditions of the members of *amicus*; 2) the COLAs due its retiree/members; as well as 3) the quality and efficiency of the services provided by the Federal Labor Relations Authority and Merit Systems Protection Board, which were explicitly created by Congress to set policy and generally administer the various facets of the federal labor program.

Amicus urges this Court to uphold the district court decision with respect to the separation of powers issue and to reconsider and reverse the court's analysis of the issue pertaining to delegation of legislative power.

STATEMENT OF THE CASE

The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1037, was signed by the President on December 12, 1985, and became immediately applicable to the current fiscal year, 1986.

On December 12, 1985, Representative Mike Synar filed an action against the United States challenging the Act's constitutionality. The United States Senate and the Comptroller General intervened as defendants.

On December 31, 1985, the National Treasury Employees Union (NTEU) filed a similar action which was con-

solidated with Synar's by Order dated January 2, 1986. Thereafter, the Speaker and Bipartisan Leadership Group of the United States House of Representatives intervened as a defendant in the consolidated cases.

The three judge District Court, *see* Act, § 274(a)(5), issued its decision on February 7, 1986, declaring that the President's February 1st sequestration order was "without legal force and effect." After finding that the plaintiffs had standing, the District Court ruled that the automatic spending reduction mechanism violated the separation of powers doctrine. However, the Court rejected plaintiff's arguments that the enormous and unguided authority the Act delegates to the Office of Management and Budget, the Congressional Budget Office and the Comptroller General to alter existing legislation violates the constitutional provision that vests all legislative powers in Congress.

The District Court thus invalidated the Act based on the unconstitutional role of the Comptroller General. The Court, however, stayed implementation of its judgment, pending appeals to this Court.

SUMMARY OF ARGUMENT

1. Under the 1985 Gramm-Rudman Act, Congress assigned the Comptroller General the responsibility of determining the amount of annual budget reductions to eliminate the federal deficit. The Comptroller General's determinations are final and binding and cannot be altered or overridden even by the President. These new duties involve "executing the laws"—a function constitutionally reserved to the President and officers under his control. Under the separation of powers doctrine, these duties cannot be performed by the Comptroller General since he is not subject to control by the President. Rather, Congress exercises control over him by virtue of a highly unusual provision in the 1921 Budget Act which gives Congress the power to remove him upon a finding of "cause."

This case should be decided on the narrow grounds that the assignment of executive functions to an office under congressional control is unconstitutional. We urge this Court to steer clear of the many unnecessary constitutional questions urged upon it. This Court need not and should not address the degree of control Congress may exercise over an officer performing nonexecutive functions. Nor should the Court address whether or to what extent Congress may otherwise limit the President's control over officers performing executive functions. By resolving the instant question on these narrow grounds the Court can thus avoid wreaking havoc on the aggregate of "independent agencies" in the so-called fourth branch of government.

2. Inherent in the Constitution is a restriction on Congress' ability to transfer its power to other entities, known as the delegation doctrine. *Amicus* urges that a reinvigorated standard for judging delegations of power should be applied in this case, including inquiry as to whether a particular power can be delegated at all. While Congress may rely upon expert advice to determine what the anticipated budgetary deficit may be and to make economic forecasts, the decision to enact a budget and appropriate specific sums of money is a uniquely legislative function protected by U.S. Const. art. I, § 8, cl. 1 and art. I, § 9, cl. 7. Congress may not delegate it to another entity, as Congress must be accountable to the people of the United States for such decisions.

This decision is also contrary to the result reached in *INS v. Chadha*, as there this Court reaffirmed that Congress can only exercise its lawmaking functions through the bicameral passage of bills. Here the lawmaking function has been delegated. This delegation further violates *Chadha*, as it precludes exercise of the President's veto power under the presentment clause.

ARGUMENT

I. THIS COURT SHOULD UPHOLD THE LOWER COURT'S FINDING OF UNCONSTITUTIONALITY BASED ON THE NARROW GROUND THAT CONGRESS' ASSIGNMENT OF EXECUTIVE DUTIES TO AN OFFICIAL WHOM IT MAY REMOVE, VIOLATES THE SEPARATION OF POWERS DOCTRINE.

This case involves a violation of the constitutional separation of powers doctrine resulting from the recent congressional assignment of executive functions to an officer under the control of Congress. This control is exercised through direct congressional power to remove him pursuant to a highly unusual statutory provision.[1] Under the Balanced Budget and Emergency Deficit Control Act of 1985 (hereafter Gramm-Rudman Act), Congress established a procedure to eliminate the federal budget deficit over a five year period through the mandatory sequestration of funds, with the key budget reduction decisions to be made by the Comptroller General of the United

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[1] The Budget and Accounting Act of 1921, codified at 31 U.S.C. §§ 701, *et seq.*, provides at § 703(e)(1) (1982):

> A Comptroller General or Deputy Comptroller General retires on becoming 70 years of age. Either may be removed at any time by
>
> (A) impeachment; or
>
> (B) joint resolution of Congress, after notice and an opportunity for a hearing, only for—
>
> (i) permanent disability;
> (ii) inefficiency;
> (iii) neglect of duty;
> (iv) malfeasance; or
> (v) a felony or conduct involving moral turpitude.

"To provide for the removal of an officer by joint resolution of Congress is confessedly something of a novelty in our legislative history. . . ." Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 353, 396 (1927).

States.[2] The duties assigned to the Comptroller General under Gramm-Rudman are extremely significant because they entrust him with responsibilities that rise to the level of "executing the laws,"—duties traditionally performed by executive officers.[3]

Although the Comptroller General is appointed by the President with the advice and consent of the Senate,[4] he is definitely not an executive officer or under control of the executive branch. The Comptroller General is an office in the General Accounting Office which was created by the Budget and Accounting Act of 1921 (hereafter 1921 Budget Act).[5] For more than sixty years, the Comptroller General has served as the independent auditor of the federal government's finances, performing legislative and adjudicatory duties at the direction of Congress.[6] Furthermore, the Comptroller General has been, and continues to be, under the control of Congress by virtue of its ability to remove him by joint resolution.[7]

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[2] Pub. L. No. 99-177, 99 Stat. 1037. The Gramm-Rudman Act provides for annual reductions in the budget deficit in order to attain a zero deficit by fiscal year 1991 by establishing annual maximum deficit levels for each fiscal year. After reviewing a mandated report of the Office of Management and Budget and the Congressional Budget Office, the Comptroller General is empowered to determine the requisite budget reductions based on his independent judgment as to the anticipated fiscal year's deficit, expected economic conditions, and the budget base of accounts and programs. The Comptroller General then issues his own report setting forth the amount of reductions to be made in each non-defense account and in each defense program, project, and activity. Section 252 of the Act *requires* the President to implement, through a sequestration order, the reductions specified by the Comptroller General.

[3] *See* Gramm-Rudman Act, § 251(b); § 252(a)(3).

[4] 31 U.S.C. § 703(a)(1) (1982).

[5] 42 Stat. 20 (codified at 31 U.S.C. §§ 701, *et seq.*).

[6] *See infra* p. 15, 16 n.49.

[7] 31 U.S.C. § 703(e)(1) (1982); *see* n.1, *supra*.

The Gramm-Rudman Act's assignment of new, executive duties to an officer under the control of the legislative branch creates a constitutional problem. The Constitution divides the power of government among three branches, giving Congress the power to legislate, the President the power to execute the laws, and the courts the power to adjudicate.[8] This separation of powers between three distinct branches of government was carefully structured by the framers as an essential means of preserving a democratic system of government and guarding against tyranny through the undue accumulation of power in any one branch.[9] The doctrine functions today to limit the exercise of governmental authority to its constitutionally prescribed branch[10] or to at least ensure that its exercise remains under the control of that branch.[11]

The Constitution vests the power to appoint officers of the United States in the President.[12] The framers believed that the ability to appoint officers was a necessary part of the power to execute the laws and thus intrinsic to the Presidential function.[13] It is the ability to exercise control over those acting on one's behalf that the framers deemed vital and which lies at the heart of their decision to give the President, rather than the legislature,[14] power over both the assignment *and removal* of officers executing the laws.[15] It is this same issue of insufficient control

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[8] U.S. CONST. art. I, § 1; art. II, § 1; art. III, § 1.

[9] *The Federalist No. 48*, at 327 (J. Madison) (P. Ford ed. 1898).

[10] *See INS v. Chadha*, 462 U.S. 919, 951 (1983).

[11] *See United States v. Nixon*, 418 U.S. 683, 707 (1974); *Nixon v. Administrator of General Services*, 433 U.S. 425, 441-443 (1977); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984).

[12] U.S. CONST., Art. II, § 2, cl. 2.

[13] *Myers v. United States*, 272 U.S. 52, 117 (1926).

[14] 272 U.S. at 127-129.

[15] 272 U.S. at 119, *citing* Roger Sherman, 1 Annals of Congress, 491.

over an officer executing the laws that makes the legislation at issue here unconstitutional.

A. The statutory assignment of executive functions to an officer not under the control of the President should be declared unconstitutional consistent with other statutes where Congress attempted to arrogate improper constitutional authority to itself.

The language and spirit of the Constitution set forth a delicately structured balance which carefully prescribes and limits the roles of Congress and the other branches. Congress' permissible involvement, both in the removal of executive officers and in the exercise of other powers, is clearly circumscribed. Where Congress has attempted to assign itself a greater role than authorized under the Constitution, this Court has rightfully struck down such laws.

In only four cases has this Court dealt with questions regarding the extent to which Congress may play a role in the President's removal of officers of the United States appointed by him.[16] A review of these cases reveals the importance of this Presidential power and the carefully limited role permitted Congress under the Constitution.

First, in *Shurtleff v. United States*,[17] the Court refused to impose any restriction on the President's power to remove at will a Customs Department official in the absence of "very clear and explicit language" evidencing such intent.[18] In the landmark case of *Myers v. United States*,[19]

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[16] The Constitution also authorizes Congress to "vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. *See In re Hennen*, 38 U.S. (13 Pet.) 230 (1839) and *United States v. Perkins*, 116 U.S. 483 (1886) where this Court evaluated the removal power over officers not appointed by the President.

[17] 189 U.S. 311 (1903).

[18] *Id.* at 315.

[19] 272 U.S. 52 (1926).

the Court found unconstitutional a statute conditioning the President's right to remove a postmaster upon the consent of the Senate. In that case, the Court found Congress' attempt to play a direct role in the removal process to be constitutionally infirm. *Myers* sharply contrasted such congressional participation with the practice affirmed in *Perkins*, which allowed Congress to prescribe incidental regulations to restrict the method by which a Department Head could remove an official he had appointed.[20]

> But the Court never has held, nor reasonably could hold . . . that the excepting clauses enables Congress to draw to itself . . . the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers.[21]

Humphrey's Executor v. United States[22] upheld the constitutionality of the Federal Trade Commission Act's removal provision, which provided that the President could only remove Federal Trade Commissioners for "cause."[23]

The Court was cognizant of the distinction between the congressional enactment of a legislative standard and congressional participation in the executive power of removal. This essential distinction was explained in the argument for the Executor.

> The sole question determined in the *Myers* case was that Congress could not compel the President to *share* with the Senate his power to remove executive officers. The power of removal is exclusively an executive function and Congress of course has no au-

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[20] 272 U.S. at 161.

[21] *Id.*

[22] 295 U.S. 602 (1935).

[23] *Id.* at 620.

> thority to appropriate to itself a power given exclusively to the President.
>
> This fundamental distinction between the *Myers* case and the enactment of a legislative standard which the President must follow in the exercise of his exclusive power of removal was expressly recognized by counsel for the United States in the argument in the *Myers* case (emphasis in original).[24]

Thus, the Court upheld the validity of this legislative standard for removal, but only as applied to officers exercising quasi-legislative or quasi-judicial powers.[25] At the same time, the Court reaffirmed the President's illimitable power of removal over purely executive officers, as in *Myers*.[26]

Finally, in *Wiener v. United States*,[27] despite statutory silence, the Court inferred from the legislative history congressional intent to place a "cause" limitation on the President's power to remove the "quasi-judicial" commissioners of the War Claims Commission.[28]

There is a clear distinction between the statute found unconstitutional in *Myers* and those upheld in the other removal cases. As was recognized both in *Myers* and in *Humphrey's Executor*, Congress exceeds its permissible role when it inserts itself in the actual removal process of executive officers. Such congressional involvement goes far beyond the role of legislating standards for the other branches to implement. Two subsequent cases in which this Court struck down statutes violating the sepa-

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[24] *Id.* at 609-610.

[25] *Id.* at 628. The Court described a Federal Trade Commissioner as "an officer who occupies no place in the executive department and who exercises no part ofthe executive power vested by the Constitution in the President." *Id.*

[26] *Id.* at 627-628.

[27] 357 U.S. 349 (1958).

[28] *Id.* at 354-355.

ration of powers doctrine illustrate the limitations on direct congressional action outside the legislative process.

In *Buckley v. Valeo*,[29] the Court addressed a series of challenges to the Federal Election Act and the "independent" Federal Election Commission created by that Act. The Court upheld a separation of powers challenge to a provision for direct legislative appointment of some members of the Commission.[30] Under that Act, the Commission was composed of six voting members, none of whom were appointed by the constitutionally prescribed procedure for appointing "officers of the United States." [31] Two of the Commissioners were appointed by the President, two appointed by the President *pro tempore* of the Senate, and two appointed by the Speaker of the House of Representatives, with *all* six subject to confirmation by a majority of *both* Houses of Congress.[32]

To determine whether the Commissioners should have been appointed by the means specified by the Constitution, the Court examined the functions of the Commission.[33] The Court found that the Commission was authorized to conduct investigations, engage in rulemaking, and adjudicate and enforce the law.[34] The Court focused on rulemaking as "the performance of a significant governmental duty exercised pursuant to a public law" which could be performed only by "officers of the United States," persons appointed pursuant to the constitutionally mandated procedure.[35] The Court found that Congress had exceeded its constitutionally limited role in the appointment process and struck down the statute.

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[29] 424 U.S. 1 (1976).

[30] *Id.* at 140.

[31] *Id.* at 113 (1976). *See also* U.S. CONST. art. II, § 2.

[32] 424 U.S. at 113.

[33] *Id.* at 109-113, 137-143.

[34] *Id.*

[35] *Id.* at 141.

It is noteworthy that Congress attempted to expand its role in the constitutional appointment process in two ways. First, it vested in itself the power to directly appoint four commissioners. Second, it sought to add to its authority by conditioning all of the appointments on the consent of both Houses of Congress.[36] Both of these efforts involved an attempt by Congress to draw to itself additional power over appointments by increasing its direct participation in the appointment process of the head of an agency exercising other than purely legislative authority.

Such congressional attempts to increase its *direct role* in the appointment process are completely distinct from congressional efforts to "limit" the appointment power of the President by legislating standards or requirements applicable to those he appoints. This was aptly noted in *Humphrey's Executor*:

> The enactment of a legislative standard to be met by appointees of the President has always been regarded both by the courts and the President as a legislative and not an executive function. No Court has ever held that the enactment of such a legislative standard to be followed by the President in making nominations is an invalid limitation upon the appointing power of the Executive. And this in spite of the fact that the power of appointment is expressly vested in the President.[37]

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[36] The impermissible usurpation of power is specifically addressed by Justice White in his separate opinion. *See Id.* at 268-269. (White, J., concurring). This congressional attempt to draw authority to itself is comparable to its attempt in *Myers* to condition the President's right to remove on the approval of the Senate. *See supra* p. 7-8. Both are improper attempts to distort the "institutional structure" engineered by the Constitution by adding a confirmatory step in the legislature. *See* Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 Wayne L. Rev. 1335, 1366 (1976).

[37] 295 U.S. at 609 (Argument for the Executor).

Congress' role in legislating standards to govern either the appointment or removal of officers of the United States is far different from a direct attempt of Congress to participate in the appointment or removal act itself. It was Congress' attempt to *insert itself* into the appointment process, beyond the congressional role, that formed the basis of the Court's decision in *Buckley*.

The *Buckley* Court evaluated this statutory scheme in light of the Constitution's fundamental purpose without having to "place" the agency in one of the three branches of government and without regard for its purportedly "independent" status.[38] Even so, the statute was found to be unconstitutional due to the excessive authority assumed by Congress over the control of the appointments process.[39]

In *INS v. Chadha*,[40] the Court struck down a one-house legislative veto provision as another congressional attempt to give to itself participatory authority beyond that authorized by the Constitution. In *Chadha*, the Court evaluated the Immigration and Nationality Act, under which Congress had conditionally delegated to the Executive Branch, specifically the Attorney General, the authority to determine whether deportable aliens met specified criteria which would allow them to remain in this country.[41] The authority delegated to the Executive was conditioned by Congress' retained "veto" of the Attorney General's decision; exercised through the adoption of a resolution of one House.[42]

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[38] *See* Strauss, *supra* n.11, at 617-19. Likewise, appellants' attempt to characterize the GAO as an "independent agency in the executive branch" has no legal or constitutional significance. *See infra* p. 20, n.64.

[39] *See infra* n.52.

[40] 462 U.S. 919 (1983).

[41] *Id.* at 954.

[42] *Id.* at 952.

The Court concluded that the only means by which Congress can act to implement policy decisions is through the legislative process specified in the Constitution which mandates bicameral passage followed by presentment to the President.[43] Thus, just as Congress' original delegation of authority to the Attorney General had to be accomplished through the legislative process, so too would any revocation of the delegation or any substantive determination by Congress on a deportation suspension.[44] Since the one-house veto provision would have empowered Congress to legislate without adhering to the prescribed bicameral process accompanied by presentment to the President, it was struck down as unconstitutional.[45]

The role sought by Congress under the Immigration Act is comparable to its similar attempts in *Buckley*, *Myers* and the case-at-hand. There was no doubt under *Chadha* that Congress could prescribe the standards under which aliens could be deported and delegate the application of those standards to the Attorney General, so long as it accomplished both means through the legislative process mandated by the Constitution. Congress could not, however, assign to one House the power to legislate, or retain control over the executive's exercise of properly delegated authority, outside of the prescribed legislative process. The attempt by Congress to expand its own power through the legislative veto directly intrudes into the functioning of another branch and violates the separation of powers doctrine.

This Court need not address the extent to which a basic constitutional function may be exercised by one of the other branches. Rather, the separation of powers principle is violated when a governmental power is placed

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[43] *Id.* at 953-55. Nor does the veto fall within any of the four express exceptions giving one House authority to act alone. *Id.*, at 955-57.

[44] *Id.* at 954-55.

[45] *Id.* at 956-59.

beyond the control of the correlate branch. Thus, the problem here is not whether or to what extent the Comptroller General, as a so-called "independent officer," can exercise executive functions. Rather, the constitutional infirmity lies with Congress assigning executive duties to an officer over whom it exercises control.

This case, like *Myers*, *Buckley* and *Chadha*, demonstrates the congressional aggrandizement of power by restricting the proper exercise of authority of another branch. This attempt constitutes a violation of the separation of power doctrine.[46] As such, this Court should strike down the Gramm-Rudman provision as an unconstitutional assignment of executive duties to an officer over whom Congress exercises control.[47]

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[46] As this Court aptly noted in *Chadha*, despite the practicality or efficiency of a particular procedure, it cannot be upheld if its operation violates the Constitution.

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable . . . There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. (citation omitted).

Id. at 959. Likewise, the *Buckley* Court found the appointment provision of the Federal Election Commission Act to be unconstitutional, despite the fact that the practical effect of retaining the appointment authority in the President may have resulted in a Commission more sympathetic to the office it was created to oversee. *See supra* p. 10-12.

[47] If this Court finds that the duties assigned to the Comptroller General under the Gramm-Rudman Act are unconstitutional it can remedy the defect in three ways: it can sever the Gramm-Rudman provision assigning the Comptroller General executive duties and let the Act's fallback provision take effect; it can sever the entire removal provision of the 1921 Act; or it can excise the language giving Congress a role in the removal process but leave the cause standard under the 1921 Act. Appellants urge this Court to remedy any constitutional defects by striking the removal provision from the 1921 Budget Act. This is clearly contrary to congressional intent as

B. This Court need not and should not now resolve whether Congress may have a direct role in removing officers of the United States performing nonexecutive functions.

Appellant Comptroller General urges the Court to initiate an evaluation of the 1921 Budget Act and to assess the constitutional compatibility of its provisions assigning duties to the Comptroller General with the provision governing his removal.[48] *Amicus* contends that it is unnecessary and unwise for the Court to do so at this juncture.

The duties assigned to the Comptroller General under the 1921 Budget Act are clearly nonexecutive.[49] Thus,

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well as to the most fundamental principles of statutory construction. "The cardinal principle of statutory construction is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). Striking the removal provision from the 1921 Budget Act contradicts this rule and would have grave and widespread ramifications. It would affect the Comptroller General in the performance of all his duties and disturb a statutory scheme which has functioned well for over sixty years. Such action is antithetical to the purposes for which GAO was created and the functions the Comptroller General performs under the Budget Act.

Furthermore, severing the 1921 Budget Act will also require the Court to address a constitutional question it can otherwise avoid: whether or to what extent Congress may limit the President's removal power by legislating "cause" standards. *See infra* p. 18-21. The constitutional defect posed by the Gramm-Rudman Act should be remedied in the least disruptive manner: striking the offending section of the Gramm-Rudman Act and allowing the fall-back procedure to remain in effect.

[48] Brief for Appellant Comptroller General of the United States at 15-18.

[49] The 1921 Act assigned to GAO the functions of auditing and settling accounts which had been previously performed by the Comptroller of the Treasury. 42 Stat. at 24-25. The District Court reviewed these duties and correctly identified them as legislative. Decision at 43, n.29 Joint Appendix (hereafter J.A.) at 71-72. The Court also noted the frequent characterization of the Comp-

the control that Congress exercises over him, by virtue of its power to remove him,[50] does not pose the same constitutional problem of legislative control over an executive officer discussed above.

Whether Congress may assign to itself, the right to remove or participate in the removal of officers of the United States exercising non-executive functions is an unresolved issue. The decisions of this Court do not address this question.[51]

Nor is there universal agreement on this question by legal scholars. Some authorities have concluded that it is within the power of Congress to endow itself with the power to remove the Comptroller General due to the legislative nature and functions of the Office.[52] However, it has been strongly argued that the power to remove even officers appointed under Article II of the Constitu-

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troller General and the GAO as "part of" or "an agency of" the legislative branch. *Id.*

Other knowledgeable legal scholars have similarly found that "[the] functions of the office are quasi-legislative. "The Comptroller General acts as the agent of Congress . . . . Congress has created an office whose functions are in no way executive . . ." Donovan and Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 Cornell L. Q. 215, 238-240 (1936). The office is also identified as legislative in light of its characteristic functions and historical derivation. "It is not a judicial office, it is not an executive office. It is an organ of the legislature; or to speak more exactly, it is an organ of the national revenue power which is vested by the Constitution in Congress." Corwin, *supra* n.1, at 396.

[50] It is undisputed that Congress sought to establish the Office of Comptroller General free from executive control due to the perceived need for an auditor independent of the executive, and in pursuit of this goal inserted its highly unusual removal clause. 31 U.S.C. § 702(a) and § 703(e)(1) (1982).

[51] *See supra* p. 7-9.

[52] Corwin, *supra* n.1 at 397; *see also* Donovan and Irvine, *supra*, n.49 at 240.

tion, lies exclusively with the President.[53] Likewise, a strict reading of the Constitution could suggest that the failure to prescribe congressional participation in the removal of officers excludes the legislature from this role.[54] This Court, like the District Court, need not and should not attempt to resolve this issue in this case.[55]

The controversy presented here results from the new duties assigned to Comptroller General under the 1985 Gramm-Rudman Act rather than any harm or injury from the 1921 Budget Act standing alone. As a result of this, the Court is not being presented with full arguments on both sides, by interested parties, to enable it to make a thorough analysis of the constitutionality of Congress' power to remove an officer performing non-executive duties.

In essence, the Court is being asked by the appellants to adjudicate the constitutionality of a statute without a true case or controversy surrounding its operation.[56] The GAO and the Comptroller General have performed their duties under the 1921 Budget Act and its amendments for over sixty years without challenge. For this reason, the Court should avoid deciding an unnecessary constitutional question.[57]

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[53] President Wilson vetoed an early form of the 1921 Budget Act believing its removal provision unconstitutional. 59 Cong. Rec. 8609-10 (1920). *See also* Brief for Appellant Comptroller General of the United States at 47-48 on the *per se* unconstitutionality of the 1921 removal provision.

[54] *See Chadha, supra* n.40.

[55] The District Court considered, but did not decide, this issue. The Court found it "at least questionable whether the power [of removal by Congress] would be approved even with respect to officers of the United States who exercise only "quasi-legislative" powers in the *Humphrey's Executor* sense[.]" Decision at 46, J.A. at 75.

[56] The prohibition against advisory opinions is premised on the requirement that the Court resolve issues only where a true case or controversy is presented. *Muskrat v. United States*, 219 U.S. 346 (1911).

[57] In *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947) the Court stated ". . . constitutional issues affecting legislation will

C. This Court need not and should not now decide whether or to what extent Congress may prescribe a standard which the President must apply in exercising his right to remove officers exercising executive functions.

The controversy in this case results from Congress' assignment of executive functions to the Comptroller General despite Congress' power to remove him for cause. As such, it is the assignment of executive duties to the Comptroller General which should be found unconstitutional because of the provision giving Congress a direct role in his removal.[58] By deciding the case on this narrow ground, the Court can limit the applicability of its holding to the specific and highly unusual facts in this case and avoid opening a "Pandora's box" of problems regarding independent officers or agencies. We are not confronted with a statute imposing a "cause" requirement on the President's power to remove officers performing executive duties. We urge this Court not to address the question of the constitutionality of such standards, for both prudential and practical considerations.

Clearly, it is not necessary for the Court to resolve this issue since the "cause standard" for removal under the 1921 Budget Act is not applied exclusively by the President. As such, the Court is not confronted with a concrete controversy regarding the power of Congress to limit the President's power to remove executive officers solely "for cause." The Court should follow its own policy of judicial restraint and avoid passing upon the constitutionality of this question.[59]

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not be determined . . . in advance of the necessity of deciding them . . ." *Id.* at 568-69.

[58] We know of no other non-legislative agency whose officers Congress can directly remove. Thus, a finding of unconstitutionality based only on the unusual removal provision will have no effect on other "independent" agencies.

[59] *See Rescue Army v. Municipal Court, supra* n.57 (judicial policy of avoiding constitutional questions).

Further, the constitutionality of Congress imposing restrictions on the President's power to remove officers who exercise some (but not exclusively) executive functions, has not been addressed by this Court nor thrashed out in the lower courts. As the District Court noted, this issue falls squarely in the "no-man's land" which *Humphrey's Executor* specifically declined to resolve.[60]

At this time, few lower court decisions have addressed this issue as the lower courts are only now beginning to confront it.[61] This is further justification for this Court to avoid addressing the extent to which Congress may regulate or restrict the President's power to remove officers performing executive functions until it has had the opportunity to receive opinions and analyses from the courts below. Such deference is a proper exercise of judicial restraint and will enable the Court to be better informed when confronting the issue.

The past few decades have seen the emergence of a myriad of administrative agencies empowered to perform all types of governmental functions. These administrative bodies, often called the "fourth branch" of government, have created a host of officials performing judicial, legislative and executive duties, yet falling outside the constitutional tripartite system of three named branches.[62] Issues such as how the constitutional separation-of-powers doctrine should be applied to agencies in the "fourth branch" and the extent and manner of

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[60] Decision at 42, J.A. at 71 *citing Humphrey's Executor* at 632.

[61] *See, e.g., Ticor Title Insurance Company v. Federal Trade Commission*, No. 85-8089 (D.D.C. Jan. 2, 1986) (Memorandum Opinion) (claim that Federal Trade Commissioners cannot constitutionally exercise "executive" law enforcement powers unless subject to President's supervisory control found unripe).

[62] "[Administrative bodies] have become a veritable Fourth branch of Government, which has deranged our three-branch legal theories. . . ." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1982) (Jackson, J., dissenting).

executive and congressional control over such agency officials, are unresolved by both the courts and the commentators.[63]

Appellants seek to characterize the GAO, and the Comptroller General, as "independent of both the President and Congress," thereby suggesting that such administrative "independence" justifies less executive oversight and permits greater control by Congress.[64] First, it is questioned by legal scholars how an administrative body may be created, that is sustainable under the Constitution, which purports to be beyond the control of the constitutionally defined branches of government.[65] Second, the notion that "independent" agencies function differently from "executive" agencies and hence deserve treatment under the Constitution, has been seriously questioned and largely discredited.[66] Finally, this Court's own rejection of congressional claims to special control over independent agencies, e.g., by invalidating legislative vetoes of independent agency action,[67] bears out the fallibility of Appellant's assertion.

As noted earlier, it is not necessary for this Court to characterize the GAO or the Comptroller General as

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[63] Strauss, *supra* n.11; Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 Yale L. J. 1766 (1985); Burkoff, *supra* n.36, at 1372.

[64] *See* Brief for Appellant Comptroller General of the United States at 9, 18-27; Brief of Appellant United States Senate at 10, 14-20.

[65] Strauss, *supra* n.11 at 612. Likewise, it is questioned how an agency can exist under the Constitution, which purports to operate in *two* branches of the government. *Id.*

[66] *See* Strauss, *supra* n.11; Note, *supra* n.63.

[67] Note, *supra*, n.63 at 1779, 1780 *citing Process Gas Consumers Group v. Consumer Energy Council*, 103 S.Ct. 3556 (1983), *aff'g Consumer Energy Council v. FERC*, 673 F.2d 425 (D.C. Cir. 1982); *United States Senate v. FTC*, 103 S.Ct. 3556 (1983), *aff'g Consumer Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc).

within a particular branch of government, in order to assess whether the functions assigned to them comport with the requisite constitutional checks and balances.[68] Nor, does the designation assigned to a particular agency necessarily resolve the constitutional restraints imposed on its officials.[69] We urge this Court to steer clear of the many unanswered constitutional questions posed by the development of the "fourth branch." The constitutionality of legislative standards limiting the President's power to remove officers in "independent" agencies, but performing executive functions, is not before the Court today. A vast number of "independent" agencies operating today, have been created by legislation which imposes such restrictions on the President's ability to remove their officers.[70] The Court need not now disturb this regulatory framework and should avoid doing so by waiting to answer these constitutional issues until properly presented in the future.

II. CONGRESS MAY NOT CONSTITUTIONALLY DELEGATE ITS POWER TO ENACT A BUDGET.

As an alternative to the limited approach urged above, *amicus* suggests that the Court disinter the remains of the delegation doctrine and resurrect it by creating new standards for its use. The delegation doctrine describes

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[68] *See supra* p. 13-14.

[69] It has been observed that "[a]n attempt to distinguish, in respect of the President's removal power, between various administrative agencies would logically require distinctions also between the same agency at different times." *Humphrey's Executor*, 295 U.S. at 618 (Argument for the United States).

[70] *E.g.*, Federal Labor Relations Authority, 5 U.S.C. § 7104(b); Federal Trade Commission, 15 U.S.C. § 41; Consumer Products Safety Commission, 15 U.S.C. § 2503(a); National Labor Relations Board, 29 U.S.C. § 153(a); Interstate Commerce Commission, 49 U.S.C. § 10301(c); National Transportation Safety Board, 49 U.S.C. § 1902(b); Nuclear Regulatory Commission, 42 U.S.C. § 5841(e), Occupational Safety and Health Commission, 29 U.S.C. § 661(b).

the limitation on Congress which prevents it from transferring all of its legislative power to other entities. It has long been recognized as constitutionally based, although its precise origin is unclear.[71] The doctrine suggests two areas of inquiry: first, whether the power being delegated is one which must be regulated entirely by Congress; and second, whether an adequate general standard has been announced, which gives the implementing entity specific guidance in exercising the delegated power.[72]

Commentators suggest that the doctrine be given new new utility.[73] The doctrine could serve the critical functions of ensuring legislative accountability and constitutional supremacy.[74] This case presents a unique opportunity to reaffirm the doctrine and to decide that the power to determine a budget for the United States is one which cannot be delegated.

A. Application of a renewed delegation doctrine warrants reversal of the District Court.

A decision to reinvigorate the delegation doctrine is particularly timely in light of the Court's decision in *INS v. Chadha*.[75] Creation of a new standard to review delegations would foster the goal of accountability which

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[71] Friedman, *Delegation of Power and Institutional Competence*, 43 U.Chi.L.Rev. 307, 310 (1976).

[72] *See Wayman v. Southard*, 23 U.S. (Wheat 10) 1 (1825). *See also Amalgamated Meat Cutters v. Connolly*, 337 F. Supp. 737, 745-746 (D.D.C. 1971), "The question is the extent to which the Constitution limits a legislature that may think it proper and needful to give the agency broad flexibility to cope with the conditions it encounters."

[73] *See, e.g.*, J. Ely, Democracy and Distrust, A Theory of Judicial Review, 131-34 (1980); T. Lowi., The End of Liberalism (1969) at 129-46, 297-99; Wright, Book Review, *Beyond Discretionary Justice*, 81 Yale L.J. 575, 582-87 (1972) (reviewing K. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969).

[74] *See infra* p. 25.

[75] 462 U.S. 919 (1983).

Congress sought to achieve by means of the legislative veto, and would do so by constitutional norms.

Despite the fact that the doctrine has not been relied upon as a basis for striking down legislation since the 1930's,[76] the doctrine has been invoked on numerous occasions in the post-World War II era by members of this court in majority decisions as well as in concurrences and dissents.[77] It has been invoked in divergent cases such as *National Cable Television Association v. United States*,[78] and *Bob Jones University v. United States*,[79] which are important in determining whether and to what extent Congress may delegate its taxing power. In *National Cable*, the Court avoided the delegation issue by narrowly construing the statute as applying only to user fees, not taxes.[80] In *Bob Jones*, while the majority upheld the delegation of power to the Internal Revenue Service,[81] Justice Powell, concurring, noted that while IRS could not be delegated the power to make the policy decision, Congress had subsequently made the same decision.[82]

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[76] *See A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935), and *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935).

[77] *United States v. Robel*, 389 U.S. 258, 272-73 (1967) (Brennan, J., concurring); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., with Stewart, J., and Douglas, J., dissenting in part); *Kent v. Dulles*, 357 U.S. 116, 127-128 (1958).

[78] 415 U.S. 336 (1974).

[79] 461 U.S. 574 (1983).

[80] 415 U.S. at 340-341.

[81] 461 U.S. at 596. One commentator, in analyzing the Court's holding, was critical of the Court's failure to address the question of whether the IRS could, in fact, legitimately be vested with the authority conferred. Casenote, *Democracy and Delegation of Legislative Authority: Bob Jones University v. U.S.*, 26 B.C.L. Rev. 745 (1985), text at n.285.

[82] 461 U.S. at 611-612. *See also, IUD v. American Petroleum Institute*, 448 U.S. 607, 672 (1980) (Rehnquist, J. concurring) and *American Textile Manufacturers Institute, Inc. v. Donovan*, 452

NFFE urges that the Court consider two principles in devising a new standard for analyzing improper delegation: the need to assure accountability and the idea of constitutional supremacy. These principles warrrant adoption of somewhat different tests as described below.

Professor Schoenbrod writes that "legislators are classically understood to be held accountable by standing for reelection based upon their votes on legislation. The approach to delegation developed in *Yakus*, and *Amalgamated Meat Cutters* . . . clashes with this notion of accountability because the legislature could let the delegate choose, in the first instance, how to balance the conflicting goals." [83]

Professor Schoenbrod would analyze most Congressional enactments according to whether they embody rules or goals and he would abjure the use of the latter, as they "state goals, which usually conflict, and delegate the job of reconciling any such conflicts to others who are entrusted with promulgating the rules of conduct necessary to achieve those goals." [84] He notes that "a goal statute can be relatively specific in that a goal may be quite precise *e.g.*, raise so much revenue, reduce power plant emissions by so many tons." [85] He argues that such a statute is constitutionally flawed because the decision on how to accomplish the goal is left to the delegate.

Applying this analysis to the Gramm-Rudman Act leads to a conclusion that it is an unconstitutional delegation of power. However detailed the iteration of its

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U.S. 490, 547 (1981) (Rehnquist, J. and Burger, C.J., dissenting) ("Congress simply abdicated its responsibility").

[83] Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223 (1985) (hereafter Schoenbrod), at n.117-119; *accord*, *Casenote*, *supra* n.81, text at n.94-97; Comment, *Reviving the Delegation Doctrine*, 1984 B.Y.U.L. Rev. 619, text at n.129-130, and n.129.

[84] *Schoenbrod*, *supra*, n.83, at 1253.

[85] *Id.* at 1255.

goal of reducing the budget, the hard choice of making policy judgments has been avoided by Congress. The so-called fallback provision is constitutional because, while it requires OMB and CBO to provide Congress with detailed information about the economy, the final decision is made by the Congress.

The principle of constitutional supremacy, as described by Professor Friedman,[86] is that the Constitution is not just one means to an end but is a binding arrangement of offices and powers.[87] If Congress abdicates its role, it defeats the critical expectation that the supreme law, the constitution, will not be changed.[88] Thus, Congress may not transfer to others the task of deciding between salient policy alternatives because *it* is uniquely suited to make such decisions.

Decisions of this Court lend support for this set of principles. For example, in *J. W. Hampton Jr. and Co. v. United States*, the Court stated, "[I]t is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President."[89] More recently, in *Chadha*, this Court noted, "There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process."[90]

The notions of constitutional supremacy and institutional competence apply equally to other branches of the government. The President may not delegate the power to pardon as he is uniquely competent to perform this task.[91] Similarly, the President's power under the presentment clause, to veto legislation, may not be withdrawn

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[86] Friedman, *supra* n.71 at 307, 311-317.

[87] *Id.* at 312.

[88] *Id.* at 312, 315.

[89] 276 U.S. at 394, 406.

[90] 462 U.S. at 959. *See supra* p. 14 n.46.

[91] Friedman, *supra* n.71 at 329-331.

from him.[92] Similarly, Congress' power to impeach may not be delegated.[93] Nor may its power to tax.[94]

Similarly, the theory of constitutional supremacy and of institutional competence requires that Congress not delegate its power to appropriate funds by means of enacting a budget. The Court below analogized Congress' power in this area to the power to tax.[95] However, this comparison is not entirely accurate, as the Constitution explicitly provides, "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." [96] Thus, the reservation of budget making powers to Congress is stronger than that of the power to tax, as Congress is affirmatively granted the power to pay the Debts by art. I, § 8, as well as being restricted by art. I, § 9.

B. The budget making authority delegated to the Comptroller General constitutes an improper delegation under *Chadha*.

This Court's landmark decision in *Chadha* has important implications in considering Congress' decision to delegate its constitutional power to appropriate funds and determine the budget to the Comptroller General. In the instant case, there is an improper delegation of the lawmaking power committed to both Congress and the President.[97] Funds are being spent according to judgments made by the Comptroller General rather than according to the specifications of an appropriations bill.

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[92] 462 U.S. at 947-948.

[93] Friedman, *supra* n.71 at 327.

[94] *Id.* at 325.

[95] Decision at 18, J.A. at 43-44.

[96] U.S. Const. art. I, § 9, cl. 7.

[97] 462 U.S. at 946-948.

Moreover, the President has been denied his constitutional power of vetoing such a bill upon presentment.[98]

A critical issue in reviewing the constitutionality of a particular delegation is whether the power in question is one which can be delegated.[99] In *Chadha* the Court held:

> Amendment and repeal of statutes, no less than enactment, must conform with Article I. . . . Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way: bicameral passage followed by presentment to the President.[100]

Reduction of the federal deficit is a legislative, non-delegable decision. The legislative character of the Comptroller General's actions are confirmed by consideration of the congressional actions he is supplanting—the passage of appropriation bills. The sequestration order has the effect of permanently cancelling amounts which would otherwise have been appropriated.[101] Thus, a uniquely legislative function, the determination of policy through the process of determining the budget of the United States has been delegated by Congress to the Comptroller General.

Finally, Congress has in effect delegated the President's power to veto legislation to the Comptroller General, as the President is required under Gramm-Rudman to adopt the final sequestration order.[102] In *Chadha*, the Court emphasized the importance of the presentment clause

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[98] U.S. Const. art. 1, § 7, cl. 2.

[99] See *supra* p. 22.

[100] 462 U.S. at 952-955.

[101] Gramm-Rudman Act, § 252(a)(4).

[102] *Id.* § 252(b)(1).

in guaranteeing the President a role in the lawmaking process. He was granted a limited and qualified power to nullify proposed legislation, subject to an override by Congress.[103] By granting the Comptroller General the final power in regard to reducing the debt, the President's essential power in the lawmaking process has been unconstitutionally delegated away from him.

CONCLUSION

The District Court decision finding the assignment of executive powers to the Comptroller General unconstitutional should be affirmed.

In the alternative, the District Court decision upholding Congress' right to delegate the power to enact a budget should be reversed as a violation of the delegation doctrine.

Should any constitutional defect be found, it should be remedied in the least disruptive manner, by striking the offending section of the Gramm-Rudman Act and implementing the fall back procedure.

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[103] 462 U.S. at 946-948.